Court of Appeals No. 47831-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SHERRY L. ESCH,

Appellant,

v.

SKAMANIA COUNTY PUBLIC UTILITY DISTRICT #1; and CLYDE D. LEACH,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

> If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.[1]

The only issue presented is whether a public official can claim their constitutional rights trump Washington's Public Records Act ("PRA") and therefore refuse to search for or produce public records stored exclusively on their private device. The PUD wants this court to expand upon this issue and rule that public records stored exclusively on a private device are outside the reach of any agency and therefore beyond the scope of the PRA.

The PUD wants a pass from having to take action to compel its official/employees to turn over public records improperly withheld from it. The PUD wants complete immunity for its acquiescence to public officials/employees refusing to provide public records from their private devices, even when those records belong to the PUD. If the PUD refuses to preserve or produce public documents, who will?

Though Commissioner Leach now claims the case is moot because he searched his computer after the appeal was filed and produced all of the public records, the PUD wants to continue his efforts to undermine the

[1] *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150, 240 P.3d 1149 (2010). This is the quote the Washington Supreme Court used in its opening line to its Opinion in *Nissen v. Pierce County,* 183 Wn.2d 863, 357 P.3d 45 (2015).

PRA by asserting his privacy interest, which apparently he no longer asserts since he searched and turned over records. Instead of promoting or defending the public's rights to public records, or even the purposes of the PRA, the PUD claims (1) the right of privacy trumps the PRA and, (2) the PRA does not apply to public officials.

The PUD asserts that once public records are placed on a private device, the person who holds those records can protect them from public disclosure by asserting a privacy interest in the storage place of the documents. According to the PUD and the trial court, an official's privacy interests are implicated whenever they are asked to *search* for public records.

The PUD's position is summarized as follows: elected officials cannot be named as parties to a PRA lawsuit, even if they refuse to turn over records. And no one can compel them, or even ask them, to search for records without violating their constitutional rights. Thus, no penalties can be assessed against the agency for failing to produce these records. The requestor and the public should therefore be denied access to public records. In other words, the public has a legal right, but no remedy.[2]

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[2] *W.R. Grace & Co. v. Dept. of Rev.*, 137 Wn.2d 580, 973 P.2d 1011 (1999); *see Willcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 600-01, 55 A.2d 521, 530-31, 174 A.L.R. 220 (1947) ("Not only is the maxim '*ubi jus ibi remedium*'—where there is a right there is a remedy—one of the proudest declarations of the common law, but it necessarily implies that a right without a remedy is not a right at all but a mere abstraction.").

Commissioner Leach, who refused to honor his settlement agreement, now wants this Court to dismiss him on mootness grounds because he has now allegedly complied with the terms of that agreement, which ironically matched the search guidelines provided by the Supreme Court in *Nissen*. He also argues the trial court lacked jurisdiction over him as a public official.

Since Leach refused to turn over public records from his private device, and because the PUD had taken no meaningful action to retrieve records legally belonging to the agency, Esch named him as a necessary party. Without Commissioner Leach, the court could not grant Esch the full remedy she was entitled under the PRA. While penalties against the PUD may be a partial remedy, it is not a substitute for receiving the actual public records.

As a final note, Esch cautions this court against the PUD's attempts to go beyond the issues and to assert irrelevant facts. For example, Esch never demanded in court that Leach consent to an independent search of his or his wife's computer.[3] While this was mentioned in a settlement proposal at the outset of the lawsuit, Esch repeatedly acknowledged before the trial court she did not have the right

[3] The PUD's citation to a settlement offer is not persuasive and intentionally obscures the facts.

to dictate how the PUD obtained the records. This Court should decline those issues not properly before it.

II. ARGUMENTS

A. Esch's motive for the records request is immaterial and cannot be considered by the agency.

As an initial matter, Esch's motive behind her PRA request is irrelevant and the PUD should not have let her perceived potential motive factor into its handling of her request. RCW 42.56.080 "forbids intent, regardless of whether it is malicious in design, from being used to determine if records are subject to disclosure."[4] The PUD's Brief shows it believed Esch was politically motivated in her request and it let that perceived motivation affect its handling of her request. Further, the PUD's efforts to malign Esch show its bias in responding to her reasonable records request.

B. Leach has no privacy interest in public records.

Leach and the PUD continue to focus on Leach's constitutional rights to privacy in his private papers, devices, and accounts. Esch's PRA request was directed to the PUD requesting **public** records. Leach has no privacy interest in *public* records in his possession or stored on a private

[4] *See DeLong v. Parmalee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010).

device.[5] The only issue is whether Leach must provide those public records to the PUD to be provided to Esch.

The PUD and Leach have been attempting from day one to turn this case into something it's not. The PUD points to a **settlement offer** to convince this Court that Esch has sued to compel an independent search when no such request has been made to any Court is legally and factually disingenuous. The PUD convinced the trial court the threshold issue was whether Leach could be compelled to have a third party search his computer, and that threshold determination put this case off the rails and made the rest of the trial court's ruling erroneous. That is not the issue, and this Court should decline the PUD and Leach's invitation to issue an advisory opinion on issues not presented.[6]

This case is much simpler: an official must comply with the PRA and provide public records in their exclusive possession and that official cannot claim a right to privacy in **public** records. In *Nissen*, the Washington Supreme Court confirmed that the PRA applies to records stored on a personal computer, and it broadened *O'Neill*'s holding to apply

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[5] *Nissen*, 183 Wn.2d at 883 ("Because an individual has no constitutional privacy interest in a *public* record, Lindquist's challenge is necessarily grounded in the constitutional rights he has in personal information commingled with those public records.").

[6] "Absent [a justiciable controversy], the court 'steps into the prohibited area of advisory opinions.'" *Walker v. Munro*, 124 Wn.2d, 411-12, 879 P.2d 920 (1994), *citing Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 51 P.2d 137 (1973).

to private cell phones and other private devices.[7] The Court again held no such privacy right exists in public records.[8]

As an agency official, Leach is responsible for searching for public records in his possession or under his control. He must then produce any public records to the PUD. The search warrant cases cited by the PUD and Leach are not persuasive as *Nissen* is directly on point: "The onus is on the agency—necessarily through its employees—to perform 'an adequate search' for the records requested."[9] The Court in *Nissen* held:

> Therefore, we hold **agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request.** Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records in the agency's possession by reviewing each record, determining if some or all of the record is exempted from production, and disclosing the record to the requester (emphasis added).[10]

Officials have no privacy right to the public documents they allow to be placed on personal devices. Further, those officials and the agency are not relieved of their obligations to search for public records. But what happens when the official refuses to search, and the agency washes its hands of the request and turns the requestor away without explanation?

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[7] *Nissen*, 183 Wn.2d at 869, *citing O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150 (2010).
[8] *Nissen*, 183 Wn.2d at 876.
[9] *Id.* at 885.
[10] *Id.* at 886.

For the trial court to grant relief, the agency must be named in the lawsuit. And Esch contends the official should be named as well for the trial court to grant complete relief.

While Lindquist, the elected official in *Nissen*, intervened and appeared to comply with the search mandate, the official here refused to comply. Did the Supreme Court really put forth an obligation on the agency **and the official** to search for records but not provide any remedy beyond penalties for noncompliance by the official? Surely not. While penalties are a partial remedy for noncompliance, there can be no substitute for producing public records.

The PUD is in the best position to seek delivery of public records in an official or employee's possession when, as here, that person refuses to comply with the PRA mandate to provide public records. The PUD could have taken any number of steps to obtain its records from Leach, including involving law enforcement if Leach insisted on keeping public records.

Because the PUD refused to act, Esch named Leach in his official capacity to afford the trial court the jurisdiction needed to compel Leach to produce the records or provide the good faith declaration.

C. Leach was and still is a necessary party under CR 19(a).

The issue is not whether the PRA authorizes "claims" against an individual. The issue is whether under certain circumstances an individual may be a necessary party to a PRA lawsuit. CR 19(a) provides that a party subject to service of process will be joined as a party if in his absence complete relief cannot be accorded among those already parties to a lawsuit. "When feasible, persons should be joined when their absence will either materially reduce the likelihood that the court can provide justice for those already parties or be detrimental to the non-parties themselves."[11]

Leach possessed public records, but those records were not provided to Esch until years after she filed her lawsuit. The PUD failed to obtain the public records from Leach after he refused to cooperate. Leach's refusal to either turn over the public records or seek a protection order under RCW 42.56.540 is why this lawsuit was filed.[12]

Washington courts have addressed the necessary party issue in PRA lawsuits. In *Burr v. Department of Corrections,* a corrections officer

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[11] Tegland, *Washington Practice, Civil Procedure,* Section 11:18 (2009).

[12] RCW 42.56.540 provides in part:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

filed a petition under RCW 42.56.540 to prevent the Department of Corrections from releasing certain documents to a prisoner.[13] Although the officers did not name the inmate/requestor as a party in their petition, the superior court granted the injunction.

On appeal, the Supreme Court held that the inmate should have been joined in the lawsuit:

> Given these circumstances, the trial court (pursuant to CR 19(a)) should have joined Mr. Parmelee because he was a necessary party whose joinder was feasible. In this case, Mr. Parmelee was the requester of records, and the absence of his joinder in an action seeking to enjoin his request impaired or impeded his interest in the subject of the action. Because of these facts, we hold that Mr. Parmelee was a necessary party whose joinder was mandatory under CR 19(a), and the failure to join requires that the judgment be vacated and the case remanded for proper joinder.[14]

If Leach or the PUD had properly availed themselves of the PRA's built-in process to protect targets of a PRA request (RCW 42.56.540), they would have needed to join Esch as a necessary party. The reverse should be true: If a requestor is forced to sue an agency because one of its public officials refuses to turn over the public records, he or she should join the official, at least until that official has complied with the law. A legal "right without a remedy is not a right at all but a mere abstraction."[15]

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[13] 168 Wn.2d 828, 231 P.3d 191 (2010).
[14] *Id.* at 836-37.
[15] *W.R. Grace*, 137 Wn.2d at n.30.

The PUD and Leach assert that since penalties cannot be assessed against Leach, and Leach is not an "agency," he is not a proper party to this lawsuit. While Leach may ultimately be dismissed from the lawsuit if he complies with the *Nissen* good faith search and affidavit protocol, that must be determined by the trial court on remand. In the meantime, Leach is a necessary party who holds the keys to being dismissed from the lawsuit.[16]

III. RESPONSE TO LEACH'S MOTION TO DISMISS

Leach has moved to dismiss the appeal based upon mootness because he alleges he fully complied with the *Nissen* "good faith" requirements and no relief is available against him. Whether Leach has complied with the *Nissen* requirements should be determined by the trial court and not by this Court as appellate courts are not in a position to be finders of fact.

Similar to the arguments why Leach should not be dismissed, this appeal is not moot because it remains to be determined whether Leach has complied with *Nissen*. Further, the trial court's erroneous ruling that Leach's privacy interests trump the PRA must be reversed because it conflicts with the Supreme Court's holding in *Nissen*. That holding has

[16] *Nissen*, 183 Wn.2d at 876 (agencies "act exclusively through their...agents, and when an employee acts within the scope of his or her employment, the employee's actions are tantamount to the "actions of the [body] itself.").

direct bearing on the rest of this case, including assessment of penalties against the PUD.

IV. CONCLUSION

Public records can exist in many places, including on private devices and stored in private accounts and "[a]n individual has no constitutional **privacy** interest in a *public* record..."[17] The "effectiveness of the PRA [cannot] hinge on 'the whim of the public officials whose activities it is designed to regulate.'"[18]

Esch requests this Court reverse the trial court's erroneous holding that a public official's privacy rights trump the PRA. It should also remand the case to determine if Leach's post-appeal efforts complied with the *Nissen* requirements. If the trial court determines on remand that Leach fully and in "good faith" complied with *Nissen,* then he may be eligible for dismissal.

If Commissioner Leach has not fully complied with the PRA and refuses to remedy the issue, then the trial court must decide the remedy. Only then will the trial court be in a position to determine what authority it has over Commissioner Leach, or the PUD, to provide Esch an adequate remedy.

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[17] *Id.* at 883
[18] *Id.* at 884.

But until that occurs, Leach is an indispensable and necessary party to this lawsuit under CR 19. And because the PUD is leading the fight to assert Leach's privacy interest against providing public records—a right that even he has now apparently abandoned, it should have to reimburse Esch her legal fees under the PRA for asserting the public's right to these records.

DATED this 7th day of April, 2016.

Respectfully Submitted,

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STATE OF WASHINGTON)
) ss.
County of Clark)

I, Heather A. Dumont, being first duly sworn on oath, depose and state that I am now and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of 21 years.

On the 7th day of April, 2016, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person(s):

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SUBSCRIBED AND SWORN to before me this ~~17th~~ 7th day of April, 2016 by Heather A. Dumont.

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NOTARY PUBLIC
STATE OF WASHINGTON
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Appellant's Reply Brief

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